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IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term 1928.

Number 20 /

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, PLAINTIFF IN ERROR,

V.

AUGUST E. HOLMBERG, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA

BRIEF OF DEFENDANT IN ERROR.

O. S. SPILLMAN, Attorney General of Nebraska,
HUGH LAMASTER, Assistant Attorney General,
Attorneys for Defendant in Error.

WEKESSER-BRINKMAN CO., Law Briefs, Lincoln, Neb.

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O. S. SPILLMAN, Attorney General of Nebraska,
HUGH LAMASTER, Assistant Attorney General,
Attorneys for Defendant in Error.

This is a proceeding in error to the Supreme Court of the State of Nebraska, which affirmed on appeal (115 Nebraska 727) an order of the Nebraska State Railway Commission requiring the plaintiff in error, Chicago, St. Paul, Minneapolis & Omaha Railway Company, to construct an underground farm crossing for the passage of live stock.

I.

STATEMENT.

The defendant in error owns a square quarter section farm through which the right-of-way and the railroad track of the plaintiff in error run diagonally (R. 14, Exhibit 3, R. 46). They enter at the southeast corner and leave near the northwest corner (R. 15, Exhibit 3, R. 46), thus cutting the farm into two almost equal parts. For convenience they will be spoken of herein as the northeast half and the southwest half. The dwelling, the other buildings, etc., are located near the southwest corner of the farm (R. 15). The well and the windmill are also on the southwest half (R. 15). There is no water supply on the northeast half (R. 16). About 900 feet from the northwest corner of the farm, there is a grade crossing (R. 46, Exhibit 3). There are gates in the fence on the right-of-way near the crossing (R. 24). There are no cattle guards at the crossing (R. 31). The crossing cannot be used by the defendant in error, except in winter because the land on either side of it is used for crops (R. 24 and 26). The crossing was built ten or fifteen years ago (R. 24). The railroad was built some thirty years ago (R. 84). For nine months last year the defendant in error did not drive any cattle through the gates (R. 24). He had to drive them around on the public road almost three quarters of a mile (R. 17 and 21) whereas it is only about one thousand feet on a direct line (R. 31). He is willing to have the present crossing taken out (R. 26). The principal pasture on the farm is in the northeast half (R. 25). It is not suitable for hay (R. 22) and because of overflow is only adapted to pasture (R. 16). There is also a small pasture of about 6 acres in the southwest half of the farm (R. 16). The southwest half of the farm is fenced hog tight (R. 17); the northeast half

is fenced with barbed wire (R. 18). If the underground crossing is built, the defendant in error expects to fence the entire farm hog tight (R. 18). The land near the grade crossing is used for farming purposes, and for that reason cattle cannot be driven back and forth across it (R. 25). The fences cannot be arranged so as to drive cattle over the grade crossing without ruining the fields (R. 25). At present the northeast half of the farm cannot be used for hogs, as they cannot be driven across the grade crossing (R. 40).

The underground crossing is essential to the use of the farm as without it the northeast half of the farm cannot be used at all for hogs, and thereby feed in the cornfields, that otherwise could be used, goes to waste (R. 18. It is also essential to the use of the farm because driving the cattle, and particularly the milk cows, a long distance around to the pasture by way of the public road, is detrimental to them (R. 17). It also consumes an hour a day to drive them (R. 21). The defendant in error is also restricted in the number of milk cows he can keep (R. 16), and those he does keep are reduced in milk production about one-third by reason of having to drive them to pasture (R. 17). A grade crossing is more dangerous than an underground crossing (R. 31).

Almost in the middle of 'the farm there is a grade of sufficient height to permit the construction of an underground pass for cattle, horses and hogs (R. 19-20). The defendant in error filed a complaint with the Nebraska State Railway Commission asking that the plaintiff in error be required to construct such a pass (R. 1-3). A full hearing was had and the pass was ordeerd upon condition, as required by the statute, that the defendant in error pay one-half of the cost thereof above $700, the remainder to be paid by the plaintiff in error (R. 11-12).

Upon appeal to the Supreme Court the order of the Commission was affirmed (R. 108).

II.

INACCURACIES AND OMISSIONS IN STATEMENT OF PLAINTIFF IN ERROR.

The statement of plaintiff in error concerning the condition of the farm is confusing because the plaintiff in error has incorporated the record of two hearings concerning this matter in the record herein. The first hearing was June 28, 1922 (R. 64). The second hearing was on April 7, 1925 (R. 6), which was the hearing in the present case. During the meantime the stock upon defendant in error's farm, changed in numbers and the arrangement of the farm was also changed somewhat.

The statement of the plaintiff in error that the sole purpose of the proposed underground crossing is to serve the personal convenience of the defendant in error (Brief 9) is inaccurate. The defendant in error desires a cattle pass because of the danger of driving stock across the grade crossing on the public highway (R. 23); because of the time that he loses in driving the cattle back and forth (R. 21); because of the injury to the stock generally, due to frequent handling, and particularly the injury to milk cows which lessens the production of milk (R. 17); because of the loss that occurs by reason of the waste of feed which could otherwise be used by his hogs (R. 18), and because he has no facilities in his pasture for watering cattle (R. 16).

It is stated by plaintiff in error (Brief 5) that the land which is fenced in the northeast half is meadow land. That statement is directly denied by the defendant in error, who stated that the land had been fenced for 16 years and used as pasture land (R. 24-25).

Attention is also called to an error in the quotation of the statute relating to this subject (p. 32 in plaintiff in error's brief). The statute is correctly quoted in the opinion of the Supreme Court of Nebraska (R. 113). It is also quoted at page 9 of this brief.

Plaintiff in error states (Brief, p. 17, par. IX) that the proposed runway under the track will not eliminate the possibility of accidents. It is also erroneously stated (Brief p. 17, par. X) that under Section 5527, Compiled Statutes of Nebraska, 1922, as amended, only one crossing may be required. It seems to be assumed that the defendant in error desires two crossings. The defendant in error desires only one crossing. He stated (R. 26) that he had no use for the grade crossing and that it might be taken out. In the finding of the Commission it was recognized (R. 10) that the grade crossing might be taken out. Under Section 5527, above mentioned, more than one crossing may be required, but it is not necessary to consider the subject as only one is asked. It is not contended that the land owner is not entitled to a crossing but that he is not entitled to an underground crossing.

III.

ARGUMENT.

Five grounds of error are relied upon by the plaintiff in error. The first charges that the decision violates the Fourteenth Amendment by taking property without due process of law. In the answer filed by the plaintiff in error with the Nebraska State Railway Commission (R. 3-4) it is not charged that the statute under which the order was entered in this case is unconstitutional. In fact, the validity of that statute is expressly recognized; an objection was made because the defendant in error had not tendered or offered to tender to the defendant, plaintiff in error herein, any part of the expense of the crossing

required to be paid by him under the terms of such statute (R. 4). Particular attention is called to the fact that in the answer it is not charged that the statute violates either the state Constitution or the Federal Constitution. An offer to pay whatever the law requires is made in the reply (R. 6).

The errors relied upon in the Supreme Court of Nebraska are not set forth in the record. The Supreme Court of Nebraska, however, considered the charges made by the plaintiff in error that the order of the Nebraska State Railway Commission violated the due process clause of the Fourteenth Amendment and the provision of the Federal Constitution prohibiting the impairment of the obligation of contracts (R. 113).

The second alleged error relates to the power of the Nebraska State Railway Commission. It is charged that the provision of the Nebraska Constitution granting the Railway Commission power to regulate the rates, service and general control of common carriers as the legislature may provide by law (Const. of Neb., Art. IV, Sec. 20) violate the equality clause of the 14th amendment of the Federal Constitution. Considerable argument is devoted to that subject in plaintiff in error's brief (pp. 43-50). As the question was not raised in the original answer of the plaintiff in error, and was, so far as the record discloses, not presented to the state Supreme Court prior to the decision, and was not considered by the Supreme Court, and was only presented to the Supreme Court of Nebraska in the motion for rehearing (Plf. Brief, 2), we take it that it will not be considered by this court. The motion or petition for rehearing does not appear in the record (R. 117).

Bushnell v. *Crooke M. & S. Co.*, 148 U. S. 682.
Kansas City Star Co. v. *Julian*, 215 U. S. 589.

Under the Constitution of Nebraska legislative power, executive power and judicial power may be united in one department.

Constitution, Article II, Section 1.

The amendment to the Constitution creating the State Railway Commission unites such powers in that body.

Constitution, Article IV, Section 20.

This union of power has been approved by the Supreme Court of Nebraska.

Hooper Telephone Company v. *Nebraska Telephone Company*, 96 Neb. 245.

In re Lincoln Traction Company, 103 Neb. 229.

Such union of powers is not repugnant to the Federal Constitution.

Prentis v. *Atlantic Coast Line Co.*, 211 U. S. 210.

Nothing is pointed out to show any possible failure to award the plaintiff in error the equal protection of the laws or to show that it did not have a fair trial before the State Railway Commission. Both parties were required to resort to the same tribunal. There was no violation of any right.

See,

Cincinnati Street R. Co. v. *Snell*, 193 U. S. 30.

The third assignment of error, that the Supreme Court of Nebraska erred in deciding that the order of the Nebraska State Railway Commission was not unreasonable and therefore not in violation of the Fourteenth Amendment, is in part a repetition of the first and second assignments of error and seems to be an effort to have this court review the findings of fact of the Supreme Court of Nebraska. The evidence sustains the findings of the Nebraska State Railway Commission and the Supreme

Court of Nebraska so found (R. 109). We take it that this court will not review the evidence and findings of fact.

Dower v. *Richards*, 151 U. S. 658.

Behn, Meyer & Co. v. *Campbell, et al.*, 205 U. S. 403.

There is nothing in the record, as far as we perceive, to bring this case within the exceptions stated in *Aetna Life Ins. Co.* v. *Dunken*, 266 U. S. 389.

The fourth assignment of error charges that the Supreme Court of Nebraska erred in holding that the order of the Nebraska State Railway Commission was valid under the police power.

The fifth assignment of error is that the Supreme Court of Nebraska erred in holding that the order of the Nebraska State Railway Commission was not in violation of the obligation of contract represented by the condemnation award.

The assignments of error may be considered under these propositions:

1. **The statute authorizing the Commission to require a railroad company to construct an underground crossing, does not take the property of the company without due process of law.**

2. **The order of the State Railway Commission does not violate the obligation of the contract represented by the condemnation proceeding. It only requires the railway company to perform its duty under such proceeding.**

3. **The order is within the police power of the State.**

Most of the cases cited below discuss all three phases.

I.

THE STATUTE AUTHORIZING THE COMMISSION TO REQUIRE A RAILROAD COMPANY TO CONSTRUCT AN

UNDERGROUND CROSSING DOES NOT TAKE THE PROPERTY OF THE COMPANY WITHOUT DUE PROCESS OF LAW.

The statute relating to farm crossings over railways was part of the Revised Statutes of 1866, being Chapter 25, Section 106 thereof (a re-enactment of a territorial act of February 8, 1864), and it reads as follows:

> "When any person owns land on both sides of any railroad, the corporation owning such railroad shall, when required so to do, make and keep in good repair one causeway or other adequate means of crossing the same."

This statute was in force when plaintiff in error secured its right-of-way by condemnation proceedings (R. 109). The railroad was built some thirty years ago (R. 84).

It will be observed that the statute provides that the railroad company shall "make and keep in good repair one causeway or other adequate means of crossing the same." As the Supreme Court said, the statute does not (R. 113), purport to describe a grade crossing nor does it preclude a further definition of "other means of crossing the same." In the case of *Omaha & R. V. Co.* v. *Severin*, 30 Neb. 318, cited by the appellant, the plaintiff sought by mandamus to compel the defendant railroad company to put in cattle guards at a farm grade crossing. The question involved in this case was not before the court. It is clear that by putting in cattle guards and allowing cattle and other animals to go at will upon the track would have greatly increased the hazards of operating the railroad. If the Severin case means that the statute above quoted referred only to grade crossings (which we do not at all concede) then it is overruled by the de-

cision of the Supreme Court of Nebraska in the present case.

Postle v. *C. B. & Q. R. R. Co.*, 98 Neb. 192, also cited by the plaintiff in error, involved a change of an existing crossing. The crossing in that case was built under an express contract between the land owner and the railroad company.

The statute of 1866, above quoted, remained in force until 1921 (Laws of 1921, Chapter 261, Section 5527, Compiled Statutes of 1922).

Section 5527 of the Compiled Statutes of Nebraska for 1922, as amended 1923, gives authority to the Nebraska State Railway Commission to require the construction of a crossing as ordered in this case. The section as amended, Chapter 167, Laws of 1923, is copied below. For convenience, the words added in 1923 are italicized. It reads as follows:

> "Section 5527. Whenever any person owns land on both sides of the right-of-way of any railroad, such railroad shall provide and keep in repair at least one adequate means for such landowner to cross the right-of-way. Any interested landowner with land on both sides of the right-of-way of any railroad may file written complaint with the state railway commission against any such railroad that the crossing is not adequate *or is unsafe and dangerous to the life and property of those who use the same*, and the commission thereupon shall make such investigation and hold such hearing as may be necessary, and shall issue such orders as it shall deem necessary, proper and adequate. If circumstances warrant the commission may require overhead, underground or grade crossings and require wing fences at underground crossings *or may require existing crossings to be relocated so as to be safe to those who use them*,

but where such special crossing involves an expenditure of more than *seven* hundred (*$700.00*) dollars the landowner shall bear one-half the expenses in excess of *seven* hundred (*$700.00*) dollars." (Before amendment, amount was six hundred [$600.00] dollars).

That law is in full force and effect and has been in full force and effect during the pendency of this case

While at the present time the statute contemplates more than one crossing and perhaps in that regard has enlarged the statute of 1866, no question as to the construction of two crossings arises in this case. There is no thought of having two crossings on the farm of the defendant in error, as pointed out above (R. 26. R. 10). The later statute, however, has not increased the obligations of the company to provide an adequate crossing, which in many cases must be, in the nature of things, an underground way. The particular sort of crossing was not defined in the Act of 1866, but the statute contemplated an adequate crossing, thus leaving the matter open so that a crossing might be made that would be adequate at the particular time.

People v. *New York Cent. & H. R. R. Co.*, 168 N. Y. 187, 61 N. E. 172, was an action in mandamus to require a railroad company to restore certain culverts in an embankment. It was held that under a statute constituting the charter of the railroad company requiring it to construct convenient passes or roads for the passage of persons, cattle, etc., giving access to a river from which the railroad would otherwise cut off access, that it was not incumbent upon the company to perpetually maintain the culverts deemed necessary when its embankment was constructed to give the owner of land intersected by it, access to a river but that it was sufficient for the company to

maintain such culverts as would meet the existing necessities. The court said:

> "It is manifest on reading this record that the issue of present necessity is tendered, and the granting of the peremptory writ was error, unless it be held, as matter of law, that the charter of the Hudson River Railroad Company must be so construed as to require the defendant to perpetually maintain the culverts deemed necessary in the year 1846, when this embankment was constructed. Such a construction of the statute is unreasonable and would work injustice, not only to the railroad company, but to the owners of property intersected by the tracks of the defendant. From the standpoint of the property owner in a given case it might well be that conditions were such in 1846 that one culvert was amply sufficient for access to the river front, and at the present time, owing to the erection of a large manufacturing establishment, or other changes that may be reasonably assumed, necessity would require in the case of an extended water front a number of culverts."

It is a fact, of which this court will doubtless take judicial notice, that in 1866 very little agriculture was carried on in Nebraska. It was then a territory sparsely settled, and most of its area, where used at all, was devoted to cattle raising. What was an adequate crossing at that time may not be an adequate crossing at this time. With the advancement of agriculture it has often become necessary to provide a different sort of crossing, if an adequate crossing is to be supplied.

N. Y. & N. E. R. Co. v. Board of Railroad Commissioners, 162 Mass. 81, 38 N. E. Rep. 27. It was held that where one conveys to a railroad company the right of way through his land so as to cut off access to a part thereof he has a way of necessity over the land conveyed and that in such case an order of the Commissioners

requiring the railroad to maintain crossings is constitutional as being merely a regulation of the right of way of necessity previously existing in such case and no new burden being thereby placed upon the railroad company.

Jones v. *Seligman*, 81 N. Y. 191, was an action to compel the construction of fences along a railroad and to construct a farm crossing under the track. Judgment was for the plaintiff. The court, in discussing the part of the case relating to crossings, said:

> "It is claimed that the three farm crossings now in existence were all conveniently located, properly made and sufficiently numerous, and that the additional crossing was not therefore required. It is a sufficient answer to this position to say that the propriety of the additional crossing, as well as the condition of the other crossings and their convenience, was a question of fact for the decision of the judge upon the trial. The existence of the old farm road as found by the judge, as well as the necessity of a crossing for cattle at the place designated was a matter to be determined by the evidence and the facts presented. The judge made a personal examination, with the consent of the parties, viewed the premises, and thus arrived at a conclusion. It is not apparent that he erred as to the location of the new crossing under the surface, or in any other respect.
>
> "The location of a crossing is to be made somewhat with reference to the needs, necessities and convenience of the owner of the farm, and he is entitled to be reasonably and fairly accommodated. The circumstances are to be considered, and the crossings should be located in view of all the surroundings, and according to the situation of the adjacent land. The railroad corporation, in the exercise of its duty in providing farm crossings, is

not vested with any such absolute discretion or arbitrary power that its decision is final and conclusive and cannot be reviewed or disturbed. While under the provision of the General Railroad Act, requiring the corporation to erect farm crossings, etc., for the use of the proprietors of lands adjoining, the interest of neither party is alone controlling, the power must be exercised in a proper manner, having due regard to the convenience of the owner of the land, and without subjecting him to needless and unreasonable injury. *Wademan* v. *A. & S. R. Co.*, 51 N. Y. 568. In the case cited, where it was shown that the crossing was inconvenient for the plaintiff and not easy of access, and that the proper place for a farm crossing was at the point where the plaintiff desired it to be made, it was held that an action would lie to compel the defendant to build a suitable crossing. If the crossings made are insufficient in number, or improperly constructed, no reason exists why they should not be increased or improved so as to be made convenient and useful. While their number or the conveniences furnished should not be unlimited, extravagant or burdensome upon the corporation, the owner of the land is entitled, in a certain degree, to the advantages to be derived from a proper and fair exercise of this power. The nature of his rights must depend greatly upon the situation of the farm, and must be determined with a due regard to the rules already laid down. The court may decide as to the kind and character of the crossing to be constructed, its necessity, and the place where it should be located. It appears that there was an embankment at the place where the last mentioned crossing was located; and we may infer that a crossing over the surface would be difficult if not impracticable. The owner of the land was entitled to such a crossing as was suitable under the circumstances, and the judge, in view of the facts, had a right to direct that the crossing should be under the surface of the road. The right to a crossing under the track was a necessity if, for

sufficient reasons, a construction over the surface of the road was not practicable, or would not answer the purposes intended. The principle referred to has been a subject of consideration in the courts, and the right to relief must rest in the sound discretion of the judge, and must be entirely equitable and just. *Clarke* v. *R. L. & N. F. R. Co.*, 18 Barb. 350; *Wademan* v. *A. & S. R. Co.*, *supra*; *Wheeler* v. *R. & S. R. Co.*, 12 Barb. 227. We think that there was no error in the findings of the court, to which reference has been had, and discover no ground for interfering with the conclusion arrived at.

"The proceedings taken to condemn the land, and the damages paid by reason thereof, do not necessarily preclude the plaintiff from maintaining an action to compel the corporation to provide suitable and proper crossings, in case it has failed to fulfill the duty imposed upon it by law. As we have seen, the crossings are to be located and made, having in view the rights of all the parties; and as the corporation may not always conform to this rule, and those provided may not answer the purposes designed, there must be a remedy to enforce the obligation which devolves upon it. If it had entirely failed to make any crossings whatever, most manifestly the courts would be authorized to grant the proper relief. For the same reason it should be compelled to make such crossings as are suitable and necessary for the proper and reasonable use of the farm by the proprietor. The proposition that when lands are taken compulsorily, the proceedings for condemnation contemplate and provide for every form of damage or inconvenience to the owner, is not well founded and cannot be upheld. In *Smith* v. *N. Y. & O. M. R. Co.* (63 N. Y. 58), it was held that a conveyance to a railroad corporation of a right of way to a road across a farm is not a waiver or release of the obligation imposed by the General Railroad Act to erect and maintain farm crossings. Church, Ch. J. says: 'It is said that when

lands are acquired compulsorily, farm crossings are deemed a part of this compensation. I am not prepared to assent to this proposition.' We think that such an item is not a proper subject of consideration in estimating damages for land taken for railroad purposes, and that they have once been made cannot affect the right of the owner to additional ones where these are insufficient."

See also:

Smith v. *New York & Oswego M. R. Co.*, 63 N. Y. 59.

Wheeler v. *Rochester & Syracuse Railroad Co.*, 12 Barb. (N. Y. Sup. Ct.) 227.

Costello v. *Grand Trunk Ry.*, 70 N. H. 403, 47 Atl. 265.

O'Malley v. *Chicago, M. & St. P. Ry. Co.*, 183 Iowa 749, 165 N. W. 1002.

Dubbs v. *Phil. & R. R. Co.*, 148 Pa. St. 66, 23 Atl. 883.

Alabama etc. R. Co. v. *Odeneal*, 73 Miss. 34.

As the statute was in force in 1866 requiring railroads to furnish adequate farm crossings it became a part of the charter of the railroad company. It is no violation of such charter to require the plaintiff to construct such a crossing now. Being an obligation assumed by it, there is no deprivation of property without due process. Under the statute as it originally stood the plaintiff in error would have had to bear the entire cost. The new statute has relieved it of a part of such cost.

II.

THE ORDER OF THE STATE RAILWAY COMMISSION DOES NOT VIOLATE THE OBLIGATION OF THE CONTRACT REPRESENED BY THE CONDEMNATION PROCEEDING. IT ONLY REQUIRES THE RAILWAY COM-

PANY TO PERFORM ITS DUTY UNDER SUCH PROCEEDING.

Under the condemnation it is obligatory on the railway company to establish and maintain an adequate crossing. As it is the duty of the company to provide a crossing the lack of crossing facilities cannot be considered as an element of damage when a right of way is taken.

In *Fremont, E. & M. V. R. Co.* v. *Lamb*, 11 Neb. 592, it is said (596):

> "By the law of this state railroad companies are required to fence their track against stock running at large, and, failing to do so, are liable to the owner of any that may be killed or injured in consequence of this omission of duty. Sec. 2, Art. 1, Ch. 72, Comp. Statutes. And when requested by the owner of land crossed by the road they are required to make and keep in good repair one crossway, or other adequate means of crossing the track. Sec. 106, Ch. 16, Comp. Statutes. The want of means for crossing the road, and the watching of cattle to keep them from the danger of passing trains, therefore, being provided for, have no proper place in a trial of the question of damages for the right of way."

Beardsley v. *Lehigh Val. Ry. Co.*, 142 N. Y. 173, 36 N. E. 877, was an action in equity to compel a railroad company to construct an underground crossing. The plaintiff prevailed. In discussing the effect of the award for damages in condemnation on the right to the crossing the court said:

> "One of the reasons now given for such a crossing is that there may be in that manner provided a safe and convenient passage for cattle to reach water which would be much more inconvenient and unsafe if the only crossings were at grade. The defendant answered that such inconvenience had already been

allowed and paid for by the award in condemnation proceedings, and some of the evidence at that time given was recited as proof of the fact. There was testimony that the line of the railroad would leave the adequate and reliable supply of water wholly on one side of the track, and the resulting inconvenience was taken into account. But the award was necessarily made upon the assumption that proper and suitable crossings would be made by the company, and the damages given are not shown to have rested to any extent upon the form or manner of constructing the crossings. Witnesses may have given their opinions on the supposition that the crossings would be at grade, but they did not say so, and it does not appear that they excluded from their minds the possibility of an under crossing, or that their estimates of the general damage to the farm would have been less if they had taken that possibility into account. The defendant promised nothing of the kind, and did not reduce or seek to reduce the damages by agreeing to give such a crossing. Both parties must be assumed to have stood upon their legal rights as to suitable crossings, and those rights survived the award, and were in no manner extinguished or affected by it. That doctrine was substantially held in *Jones* v. *Seligman*, 81 N. Y. 190."

Lewis, Eminent Domain (3rd Ed.), Vol. 2, p. 1483, Section 851.

III.

THE ORDER OF THE STATE RAILWAY COMMISSION IS WITHIN THE POLICE POWER OF THE STATE.

The right to require a railroad company to construct crossing when it has received its right of way by federal grant, is distinctly recognized in the case of *Northern Pacific* v. *Townsend*, 190 U. S. 267. In that case it was decided that a portion of the right of way of a

railroad company secured by a federal grant could not be held by adverse possession.

This court said (272):

> "Of course, nothing that has been said in anywise imports that a right of way granted through the public domain within a state is not amenable to the police power of the state. Congress must have assumed when making this grant, for instance, that in the natural order of events, as settlements were made along the line of the railroad, crossing of the right of way would become necessary, and that other limitations in favor of the general public upon an exclusive right of occupancy by the railroad of its right of way might be justly imposed. But such limitations are in no sense analogous to claim of adverse ownership for private use."

In *Northern Pac. R. Co.* v. *Ely*, 197 U. S. 1, it is said (5):

> "As before stated, on the fourth day of May, 1903, the decision of this court in *Northern Pacific Railway Company* v. *Townsend*, 190 U. S. 267, was announced. We there ruled that individuals could not, for private purposes, acquire by adverse possession, under a state statute of limitations, any portion of a right of way granted by the United States to a railroad company in the manner and under the conditions that the right of way was granted to the Northern Pacific Railroad Company. At the same time it was not denied that such right of way granted through the public domain within a state was amenable to the police power of the state. And we said: 'Congress must have assumed when making this grant, for instance, that in the natural order of events, as settlements were made along the line of the railroad, crossings of the right of way would become necessary, and that other limitations in favor of the general public upon an exclusive right of occupancy by the

> railroad of its right of way might be justly imposed. But such limitations are in no sense analogous to claim of adverse ownership for private use.'"

Lindemann v. *St. Joseph & G. I. Ry. Co.*, 113 Neb. 284, involved the power of the State Railway Commission under the Act of 1921 (Laws 1921, Chap. 261), above quoted, to require the construction of a grade crossing. It was contended in that case by the railway company that as it had received its right of way under a Federal land grant it might not be required to construct a crossing. It was held, under the authority of *Northern Pacific R. Co.* v. *Townsend*, 190 U. S. 267, that the railway company was not exempt from the police power of the state and the order of the Nebraska State Railway Commission was sustained.

The police power of the state to require the construction of private crossings is recognized in *Fremont, E. & M. V. R. Co.* v. *Lamb*, *supra*.

In *State ex rel* v. *C. B. & Q. R. Co.*, 29 Neb. 412, it is said in reference to the statute concerning crossings over roads, both public and private (417):

> "It cannot be doubted that said section 1 makes it the duty of railroad companies to make and keep in repair all crossings at public highways. The respondent insists that the act is unconstitutional, as it imposed a burden on the corporation that did not exist when it was incorporated. Under the general police power of the state, the legislature has authority to place new and additional burdens upon corporations, when such burdens are for the safety of the people and for the public good, although the power to do so may not be reserved in the charter. This right has been so frequently recognized by the courts that it can no longer well be questioned."

Illinois Central R. R. Co. v. *Willenborg, et al.*, 117 Ill. 203. This is one of the leading cases on the subject. It was an action in injunction by the railroad company against Willenborg, who owned land on both sides of the right of way. The defendant notified the company to construct a crossing at a certain point, stating that in default thereof he would construct it at the company's expense. The bill was filed to prevent such construction. It appeared that the deed from Willenborg's grantor conveying the company a right of way across the land contained a clause obligating the company to erect and maintain suitable crossings. It also appeared that the company had voluntarily constructed and maintained a crossing for the use of the owner of the land at a point about three hundred feet from the point at which Willenborg insisted upon having a crossing. The defendant, Willenborg, (the other defendant was merely a nominal party) denied that the proposed crossing would be dangerous either to the parties using it or to the company. After filing the answer the defendant also filed a cross bill alleging the duty of the company to construct the crossing both by reason of the statute and because of the covenants contained in the right of way deed. The lower court dismissed the original bill and granted the relief prayed in the cross bill. The company took the case to the Supreme Court of Illinois on error.

After a consideration of the provisions of the deed the court referred to the statutory obligation of the company. The court said (207-211):

> "But the decision dismissing the original bill, as was done, may be sustained on the broad ground it was the duty of the company, under the statute, to construct suitable farm crossings for the use of the parties through whose lands its road-bed is constructed. Section 1 of the act of 1874, in relation to fenc-

ing and operating a railroad, makes it the duty of every railroad corporation, within six months after its line is open for use, to construct farm crossings 'when and where the same may be found necessary for the use of the proprietor of the land adjoining such railroad.' Section 3 of the same act provides, whenever a railroad corporation shall neglect or refuse to build or repair such farm crossings, as provided in that act, the owner or occupant of the lands adjoining such railroad through which the railroad track is or may be laid, may give notice in writing to such corporation to build such crossing ten days after service of the notice. Section 4 provides, in case the corporation refuses to build such crossing after notice, as provided in section 3, the owner or occupant of such land may build it, and may recover double the value thereof from the defaulting corporation, with damages. Had similar provisions with these sections of the statute been incorporated in the charter of the corporation, or existed in some law that entered into its charter, it would hardly have been insisted the company would not be bound to observe them, or that their enforcement would violate any provisions of the constitution.

"The point is made, however, that these provisions are not obligatory on this corporation, because they were enacted many years since it received its charter from the state. This is a misapprehension of the law. The regulations in regard to fencing railroad tracks, and the construction of farm crossings for the use of adjoining land owners, are police regulations in the strict sense of those terms, and apply with equal force to corporations whose tracks are already built, as well as those to be thereafter constructed. They have reference to the public security, both as to persons and to property. All property devoted to public uses takes on a nature or qualification *quasi* public, and is for that reason held to be subject to legislative control in a greater or less degree, and to which the mere private property of the citizen is

not subjected. Rights purely and exclusively private, in nowise affecting others, and in no way affecting public morals, are not regarded as being within the control of the police power; nor can mere private property be taken for public uses without making to the owner just compensation; yet the law has always required the citizen to so use his property as not unnecessarily to injure another; and, to compel the observance of that rule, even private property may be brought within legislative control to that extent. But where property, whether belonging to a natural person or to a corporation, becomes 'affected with a public interest, it ceases to be *juris privati* only.' Where a party devotes his property to a public use, the community at large acquire such a qualified interest as will subject it to legislative control for the common welfare. Accordingly, the property of railroads, and other similar corporations transacting business for and with the public, has been subjected to burdens not imposed on the owners of mere private property, used purely and exclusively for private interests. The distinctions in this regard have been uniformly observed. It is for this reason it has been frequently held that railroad corporations, notwithstanding no such right had been reserved in their charters, may be required to fence their track, to put in cattle guards, to place upon their engines a bell, and to do many other things for the protection of life and property. No public exigency has ever made it necessary to impose such burdens on the citizen exercising no functions or occupations in their nature public or *quasi* public. Railroad companies are public corporations, in a limited sense, although the right of way, the road-bed, and the track thereon, are for the exclusive use of the owners, over which only their own conveyances are propelled. All others are excluded. The traffic, however, on railways, bears no analogy to our notions of travel on an ordinary street or highway. The uses are totally different, and even inconsistent. The one is exclusive in favor of the owner, and the other is open and free to all. The common

use of railroads by the public could not be otherwise than dangerous. It is for that reason their use is restricted to the owner. The fact railroad corporations are granted exclusive franchises to conduct a business in its nature public, must subject them to all reasonable control to secure the public safety and welfare. It is now the settled law, that railroad corporations are within the operation of all reasonable police regulations, otherwise there would be no security for the life or property of the citizen residing in the vicinity.

"No reason is perceived why, upon the same principle on which a railroad corporation may be required to fence its track and construct cattleguards, it may not be required also to construct farm crossings. The one is as much required as the other for the convenience and safety of the adjoining land owners. Such corporations are permitted, in order to secure the best and most useful road-bed, to make deep cuts and throw up embankments on their right of way through farms. On account of the peculiar construction of all railways, it is obvious it is impracticable for the owner whose lands are divided by the track, to pass from one part to another unless crossings are provided. Indeed, it would be most dangerous if persons should attempt to cross a railroad track at a point where no provision is made for that purpose, and persons are not permitted to do so. It certainly can not be inferred the legislature would irrevocably grant to a railroad corporation a franchise to construct a railway through farm lands in such manner as to cut off all right of passage to and from the portion separated by the roadbed. The proposition a corporation can construct a railroad from Galena to Cairo, and can not, under the police power of the state, be compelled to construct 'farm crossings' over its track for the use of the owners of lands over which it passes, is too absurd to be considered seriously. That would occasion irreparable injury to the adjoining proprie-

tor, and would be in violation of that maxim of the law, *sic utere tuo ut alienum non laedas.*"

The Willenborg case was cited approvingly in

Village of Atwood v. *Cincinnati, I. & W. R. Co.*, 316 Ill. 425, 147 N. E. 449.

Northern Trust Co. v. *Chicago Rys. Co.*, 318 Ill. 402, 149 N. E. 422.

See

Elliott on Railroads (3rd Ed.), Vol. 3, Sections 1628-1629.

Emmons v. *M. & S. L. R. Co.*, 35 Minn. 503, was an action for damages caused by the failure of the defendant railway company to fence its right of way as required by statute. The complaint was founded on the reduced rental value of the land, due to lack of such fences. The trial judge ruled that only damages caused directly by injury to live stock could be recovered; that consequential damage due to the necessity of herding stock and the consequent reduction of rental value of the land, were not recoverable. The supreme court of the state sustained the complaint and reversed the decision. In doing so it said (506):

> "To regulate the carrying on of any business liable to be injurious to the property of others, like that of operating a railroad, so that it shall do the least possible injury to such property, is as much within the police power of the state as regulating it with a view to protect life from its dangers. There can be no doubt that the state may, under that power, require railroads to be so constructed, maintained, and operated, and so protected or inclosed, that they will injure as little as possible the farms or lands through or alongside of which they run."

The case was again before the court and is reported in 38 Minn. 215. It was again reversed, this time because

the trial judge had limited the recovery to the cost of building the fence. It was remanded and after another trial below, the case reappeared in the supreme court on appeal by the railway company. An exception to the evidence was overruled and the judgment for the land owner was affirmed. 41 Minn. 133. The case was then carried on error to the Supreme Court of the United States, where it appears under the title:

Minneapolis & S. L. R. Co. v. *Emmons*, 149 U. S. 364.

The case in this court involved the sufficiency of the complaint. In the opinion it is said (366):

> "This case had, on a previous occasion, been before the Supreme Court of the state on appeal. The court below had held that the complaint did not state facts sufficient to constitute a cause of action, and dismissed it and refused a motion for a new trial. On appeal from the order denying the motion the ruling below was reversed and a new trial granted. In giving its decision, the Supreme Court, among other things, held that to regulate the carrying on of any business liable to be injurious to the property of others, like that of operating a railroad so that it shall do the least possible injury to such property, was as much within the police power of the state as regulating it with a view to protect life from its dangers; and that the state might, under that power, require railroads to be so constructed, maintained, and operated and so protected and enclosed, that they would injure as little as possible the farms or lands through or alongside of which they run, and that the legislation of the state having this object in view was valid.
>
> "It was objected below that the statute, as thus interpreted, denied to the railroad companies the equal protection of the laws of the state, as required by the first section of the Fourteenth Amendment,

The point of the objection, as indicated in the opinion of the Supreme Court, so far as we can understand it, was this, that the statute in requiring railway companies to fence their roads was a police regulation having for its object to prevent animals from getting on the tracks and the consequent danger of injury to the animals themselves and to railway passengers and employees; and, therefore, to impose penalties and authorize a recovery of damages for non-compliance with the law for other than the resultant injuries to animals and railway passengers and employees, was in excess of the police power of the state, and a departure from its general law, which imposed penalties and damages only for the direct injuries sought to be prevented, and did not extend them so as to cover consequential and possible resulting injuries.

"The answer to this is that there is no inhibition upon a state to impose such penalties for disregard of its police regulations as will insure prompt obedience to their requirements. For what injuries the party violating their requirements shall be liable, whether immediate or remote, is a matter of legislative discretion. The operating of railroads without fences and cattle guards undoubtedly increases the danger which attends the operation of all railroads. It is only by such fences and guards that the straying of cattle, running at large, upon the tracks can be prevented and security had against accidents from that source; and the extent of the penalties which should be imposed by the state for any disregard of its legislation in that respect is a matter entirely within its control. It was not essential that the penalty should be confined to damages for the actual loss to the owner of cattle injured by the want of fences and guards; it was entirely competent for the legislature to subject the company to any incidental or consequential damages, such as the loss of rent, the expenses of keeping watch to guard cattle from straying upon the tracks, or any other expenditure to which

the adjoining owner was subjected in consequence of failure of the company to construct the required fences and cattle guards. No discrimination is made against any particular railroad companies or corporations; all are treated alike, and required to perform the same duty, and, therefore, no invasion was attempted of the equality of protection ordained by the Fourteenth Amendment.

"It was also objected that the statutes of Minnesota, in requiring the defendant to build partition fences for the benefit of adjoining land owners, or to pay damages for not building them, imposes upon the company a duty not required by contract, common law, or its charter, and is, therefore, a violation of the right conferred by the charter to buy and hold lands for specified purposes, the same as any other land owner.

"To this position we answer that the extent of the obligation and duties required of railway corporations or companies by their charters does not create any limitation upon the state against imposing all such further duties as may be deemed essential or important for the safety of the public, the security of passengers and employees, or the protection of the property of adjoining owners. The imposing of proper penalties for the enforcement of such additional duties is unquestionably within the police powers of the state. No contract with any person, individual or corporate, can impose restrictions upon the power of the states in this respect.

"The objection that by allowing damages for the diminution of value in the adjoining farm caused by the failure of the company to fence its roads and to construct proper cattle guards, is taking property of the defendant without due process of law, falls with the supposed invalidity of such consequential damages which we hold to be within the discretion of the legislature to impose."

The decision of the Minnesota Supreme Court was affirmed.

See also:

Dwyer v. *Chicago Northwestern Railway Co.*, 11 S. D. 535, 171 N. W. Rep. 760.

Chicago B. & Q. R. Co. v. *Illinois*, 200 U. S. 561.

Chicago & A. R. Co. v. *Tranbarger*, 238 U. S. 67 was an action under a Missouri statute requiring suitable openings and ditches across a railway right-of-way for drainage purposes. The suit was instituted by the owner of 60 acres of land injured on account of the lack of such openings. This court said (77):

> "We deem it very clear that the act under consideration is a legitimate exercise of the police power, and not in any proper sense a taking of the property of plaintiff in error. The case is not at all analogous to those which have held that the taking of a right of way across one's land for a drainage ditch, where no water-course exists, is a taking of property within the meaning of the Constitution. The present regulation is for the prevention of damage attributable to the railroad embankment itself, and amounts merely to an application of the maxim *Sic utere tuo ut alienum non laedas.* Of course, compliance with it involves the expenditure of money; but so does compliance with regulations requiring a railroad company to keep its roadbed and right of way free from combustible matters; to provide its locomotive engines with spark arresters; to fence its tracks; to provide cattle guards and gates at crossings, or bridges or viaducts, or the like. Such regulations as these are closely analogous in principle, and have been many times sustained as constitutional. *Minn. & St. L. Railway Co.* v. *Beckwith*, 129 U. S. 26, 31; *Minneapolis & St. Louis Railway* v. *Emmons*, 149 U. S. 364, 367; *St. Louis & San Francisco Ry.* v. *Mathews*, 165 U. S. 1; *Chicago, etc. Ry.* v. *Minneapolis*, 232 U.

S. 430, 438; *Atlantic Coast Line R. Co.* v. *Goldsboro,* 232 U. S. 548, 560, 561.

"And it is well settled that the enforcement of uncompensated obedience to a legitimate regulation established under the police power is not a taking of property without compensation, or without due process of law, in the sense of the Fourteenth Amendment."

CONCLUSION.

The construction of the underground crossing would eliminate nearly all of the danger caused by the existing crossing. It would also add to the safety of travelers and of operatives on the railway. It is also essential to the efficient and profitable conduct of defendant in error's farm. The order requiring it is in accord with the statutes and none of the statutes offends constitutional guaranties. The plaintiff in error, in building its railroad, obligated itself to provide adequate crossings. The order only requires performance of that agreement.

The defendant in error asks that the decision of the Supreme Court of Nebraska be affirmed.

Respectfully submitted,

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